Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOHN MANNING and DEAN ZELINSKY,

Petitioners,

v.

CITY OF CHICAGO, THE OXFORD HOUSE, ZERO PLUS DIALING, INC., RESURGENS COMMUNICATIONS GROUP, INC., INTERNATIONAL TELECHARGE, INC., OPERATOR ASSISTANCE NETWORK, SHEFFIELD SYSTEMS, INC., PEOPLE'S TELEPHONE CO., INC., TELECOM USA, and ILLINOIS BELL TELEPHONE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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In a cause of action which seeks redress for millions of consumers deceived by trade dress violations and other breaches of the common law and state consumer protection statutes, the state court ruled that all such remedies were barred by federal pre-emption.

QUESTION PRESENTED

Whether the state court erred in precluding Petitioners-Plaintiffs from pursuing state law remedies on the basis of pre-emption by the Federal Communications Act and the Telephone Operator Consumer Services Improvement Act.

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PETITION FOR WRIT OF CERTIORARI

Petitioners-Plaintiffs ("Plaintiffs"), John Manning and Dean Zelinsky, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, First District, entered in this cause on November 13, 1995.

OPINIONS AND ORDERS BELOW

The denial by the Supreme Court of Illinois of Plaintiffs' petition for leave to appeal is reprinted at page 1 of the appendix ("App.").

The opinion of the Appellate Court of Illinois, First District, has been reported as *Manning v. City of Chicago*, 276 Ill. App. 3d 260, 657 N.E.2d 1123 (1995). It is reprinted at App. 2.

The order of the Circuit Court of Cook County, Illinois, County Department, Chancery Division, denying Plaintiffs' motion to vacate that court's July 14, 1992 order dismissing the case and denying Plaintiffs' motion to file amended complaint is reprinted at App. 15.

The memorandum of opinion of the Circuit Court of Cook County, Illinois, County Department, Chancery Division, denying Plaintiffs' motions to vacate dismissal and for leave to file amended complaint has not been reported. It is reprinted at App. 16.

The order of the Circuit Court of Cook County, Illinois, County Department, Chancery Division, dismissing the case is reprinted at App. 22.

JURISDICTION

Plaintiffs brought this action in the Circuit Court of Cook County ("circuit court"), Illinois, on December 11, 1992, alleging four causes of action under Illinois state law. On July 14, 1993, the circuit court dismissed Plaintiffs' complaint on the basis that it was pre-empted by federal law as set forth in the Federal Communications Act ("Communications Act"), 47 U.S.C. § 151, *et seq.*, and

the Telephone Operator Consumer Services Improvement Act ("TOCSIA"), 47 U.S.C. § 226. (App. 22).

On September 17, 1993, the circuit court denied Plaintiffs' motions to vacate the dismissal order and for leave to file amended complaint. (App. 15). After Plaintiffs appealed, the Appellate Court of Illinois, First District, affirmed the circuit court's order on November 13, 1995. (App. 2).

On April 3, 1996, the Supreme Court of Illinois denied Plaintiffs' petition for leave to appeal. (App. 1).

The jurisdiction of this Court to review the concerned judgment is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

47 U.S.C. § 226

. . .

(d)(1) The Commission shall conduct a rulemaking proceeding pursuant to this subchapter to prescribe regulations to —

(A) protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls; and

(B) ensure that consumers have the opportunity to make informed choices in making such calls.

. . .

(i) Nothing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this chapter.

47 U.S.C. § 414

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

STATEMENT OF THE CASE

On December 11, 1992, Plaintiffs, John Manning and Dean Zelinsky, filed a Class Action Complaint ("Complaint") against Respondents-Defendants ("Defendants") in Illinois state court alleging four state law causes of action under: 1) the Illinois Uniform Deceptive Trade Practices Act; 2) the Illinois Consumer Fraud and Deceptive Business Practices Act; 3) common law deceptive trade practice and advertising; and 4) fraud. The complaint alleged that Defendants deceptively induced Plaintiffs to use phones with less-sought-after alternate operator services. Plaintiffs alleged that one or more of the Defendants engaged in such deception by passing off their public pay telephones, and the related phone service, as being those of other more commonly recognized competitors, i.e. AT&T and various Bell operating companies, often referred to as "Baby Bells" ("Bell"), by imitating or actually using, *inter alia*, the telephone facade trade dress of these more popular telephone companies. Plaintiffs would use Defendants' telephones to place a telephone call, believing that they were using an AT&T or Bell serviced telephone, when in actuality they were using an alternate operator service. Plaintiffs did not allege that the rates and services themselves were unreasonable or illegal; rather, Plaintiffs alleged, *inter alia*, that they were injured by having unfairly incurred

different rates and services through Defendants' deceptive telephone trade dress and concomitant unlawful state statutory and common law practices.

Defendants, jointly and/or individually, filed various dispositive motions arguing that Plaintiffs' claims were pre-empted by the Communications Act and TOCSIA. On July 14, 1993, the circuit court dismissed Plaintiffs' complaint with prejudice, concluding that Plaintiffs' state law claims were pre-empted by the Communications Act and TOCSIA, and dismissed the case as to all Defendants. (App. 22). After the circuit court's ruling, Plaintiffs filed motions to vacate the order of dismissal and for leave to file a first amended complaint. On September 17, 1993, the circuit court denied both motions. (App. 16-21).

Plaintiffs filed an appeal of the circuit court's ruling with the Appellate Court of Illinois ("appellate court") arguing that their state law claims were not pre-empted by either the Communications Act or TOCSIA, as Plaintiffs were not challenging the rates, terms or conditions imposed on the operator services, the only grounds on which federal pre-emption would apply. Plaintiffs argued they were entitled to pursue their statutory and common law remedies in state court. On November 13, 1995, the appellate court denied Plaintiffs' appeal. The appellate court affirmed the circuit court's order that Plaintiffs' complaint was pre-empted by federal law set out in the Communications Act and TOCSIA, and as a consequence, amendment of Plaintiffs' complaint would have been fruitless. (App. 14). In regard to the pre-emption issues, the appellate court found that the entire field of operator services is pre-empted by Federal law. (App. 14).

Thereafter, Plaintiffs petitioned the Supreme Court of Illinois for leave to appeal. Plaintiffs argued that the appellate court misconstrued the scope of federal pre-emption under TOCSIA and that the court dismissed the possibility of concurrent federal and state action in the area of operator services, despite the existence of the saving clause (47 U.S.C. § 414) contained in the Communications Act. On April 3, 1996, the Supreme Court of Illinois denied Plaintiffs' petition for leave to appeal. (App. 1).

REASONS FOR GRANTING THE WRIT

In affirming the circuit court's dismissal of the case and denial of Plaintiffs' motions to vacate the order of dismissal and to amend the complaint, the appellate court misconstrued federal pre-emption under the Communications Act and TOCSIA. The appellate court stated that because "the entire field of operator services is pre-empted by Federal law," pre-emption applies to Plaintiffs' causes of action and, therefore, Plaintiffs "could not have stated a cause of action." (App. 14). Such an application by the appellate court of federal pre-emption is overly broad and its holding basically deprives not only the Plaintiffs but all similarly situated individuals of their rights under common law and applicable state statutes, such rights which are allowed and recognized under the Communications Act and TOCSIA. A finding of "entire preemption" by a state court has great significance, especially considering this Court's hesitancy to divest individuals of their long-standing common law rights which, "even absent a saving clause, is not to be abrogated 'unless it be found that the preexisting right is so repugnant

to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.' " *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298 (1976) (citing *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907). Furthermore, this Court has generally been reluctant to allow complete federal pre-emption over state law claims and "has recognized the existence of complete preemption in only three instances: under Section 301 of the Labor Management Relations Act, under Section 1132 of ERISA, and with regard to certain tribal claims." Wright, Miller, Cooper, Federal Practice & Procedure: Jurisdiction 2d § 3522 (1996 Suppl.).

While the Communications Act is recognized as having pre-emptive reach over certain state laws, the saving clause contained within the Communications Act indicates that Congress did not intend "to supplant all State regulation of interstate telephone carriers . . ." and that "[s]tate-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by Section 414." *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 441 and 443, 493 N.E.2d 1045 (1986), *cert. denied*, 479 U.S. 949 (1986). Accordingly, under the saving clause, a broad range of state law causes of action is protected from federal pre-emption. However, the appellate court's ruling severely narrowed the scope of protection set forth by Congress; the court effectively limits the scope of the saving clause to such an extent that it basically holds that the saving clause provides protection from federal pre-emption only to those state claims that involve advertising. This under-

mines the intent Congress had when it enacted the saving clause. Further, such a broad construction runs contra to the current federal pre-emption analysis; courts have recently given greater focus and analysis in determining the scope of pre-emption. *See Lohr v. Medtronic, Inc.*, Nos. 95-754, 95-886, 1996 U.S. LEXIS 4260 (1996) (the Court analyzed each state law claim individually in determining that the Medical Device Amendments Act did not pre-empt any of the claims).

In addition to under-applying the scope of protection the saving clause affords state law causes of action in relation to the Communications Act prior to the enactment of TOCSIA, the appellate court misapplies the scope of federal pre-emption under TOCSIA in finding the "entire field" pre-empted and by ignoring the effect of the saving clause in relation to TOCSIA. The appellate court's expansive ruling held that TOCSIA pre-empts all of Plaintiffs' state law causes of action in the area of operator services. In addition, the appellate court's failure to apply the saving clause, 47 U.S.C. § 414, of the Communications Act to TOCSIA, which is contained within the Communications Act, effectively nullifies its force and effect. Such a consequence was not anticipated nor intended by Congress, and the state court should not broaden the expanse of federal pre-emption in the absence of any federal intent to do so. By leaving the saving clause in place after the enactment of TOCSIA, Congress demonstrated its intent that the saving clause continue to have application over the entire Communications Act, including TOCSIA.

I.

STATE LAW CAUSES OF ACTION SHOULD NOT BE PRE-EMPTED CONTRARY TO AN EXTANT SAVING CLAUSE AND CONGRESSIONAL INTENT.

The pre-emption analysis begins with the proposition that "where the states have traditionally occupied a field, we must 'start with the assumption that the historic police powers of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of congress.' " *Tebbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995), *cert. denied*, 1996 U.S. LEXIS 487 (1996) (holding the federal National Traffic and Motor Vehicle Safety Act of 1996 did not pre-empt state actions) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)). "[B]ecause the states are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Lohr*, 1996 U.S. LEXIS 4260, at *25.

The Communications Act expressly states that its purpose is to "make available, so far as possible . . . a rapid, efficient . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. While the Communications Act maintains federal jurisdiction over the rates, terms and conditions of interstate operator services, it does not completely pre-empt state law claims in the area of interstate operator services; further, the Communications Act does not pre-empt state law claims in the area of intrastate operator services. 47 U.S.C. § 152. Congress expressly provided for state law claims in the area of interstate operator services through the enactment of a "saving clause" within the Communications Act, which states:

> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

42 U.S.C. § 414. Accordingly, the Communications Act recognizes that state action can exist equally alongside the parameters of federal regulations. *See Coop. Communications, Inc. v. AT&T Corp.*, 867 F. Supp. 1511, 1516 (D.Utah 1994) (holding that independent state law causes of action were not subsumed by the Communications Act but remained separate causes of action); *Am. Inmate Phone Sys. v. US Sprint*, 787 F. Supp. 852, 856 (N.D.Ill. 1992) (holding that the Communications Act does not pre-empt contract and Illinois Consumer Fraud Act claims). Congress clearly intended that long-standing state law causes of action remain available to individuals. The Federal Communications Commission ("FCC") further supported the breadth and the scope in which the saving clause protected state law claims from federal pre-emption when it stated that "Section 414 of the Act preserves the availability against interstate carriers of such preexisting state remedies as tort, breach of contract, negligence, fraud and misrepresentation—remedies generally applicable to all corporations operating in the state, not just telecommunications carriers." *In re OSPA*, 6 F.C.C.R. 4475, 1991 FCC LEXIS 3735, at *10 (1991). *See also Kellerman*, 112 Ill. 2d at 443-44 (no pre-emption of state law claims for fraud and deceptive practices when the actions did not involve the quality of the service nor the reasonableness and lawfulness of the rates).

The appellate court in this case unilaterally redefined a new scope of federal pre-emption, by expanding the scope of pre-emption and narrowing the scope of protec-

tion intended by Congress. Plaintiffs were deprived of common law and state statutory remedies by this misapplication of pre-emption. Nowhere in Plaintiffs' complaint is there any challenge to the reasonableness or lawfulness of Defendants' rates. Plaintiffs' allegations of damage caused by Defendants' deceitful passing-off tactics, i.e., paying substantially higher operator assistance rates, cannot fairly be confused with an attack on the rates themselves. Plaintiffs were damaged regardless of the lawfulness of the rates, in that they were deceived into dealing with parties other than as represented. It is the manner in which the Defendants deceptively display and portray their services as those of another through deceptive trade dress which Plaintiffs challenge. Plaintiffs are only seeking that Defendants be held to the same standards as required of all businesses. Challenging the manner in which the Defendants make their public pay phones look as those of others has no relation to rates, terms or services and does not intrude upon the area of federal law. If anything, Plaintiffs' position is supportive of the concerned Congressional intent as preventing laissez-faire endorsement to tortfeasors and will ensure healthier competition and availability of service.

Had the appellate court correctly followed the intended application of the saving clause in the Communications Act to Plaintiffs' state law claims, it would have asked whether the state law claims alleged interfere or conflict with federal authority over interstate telephone charges or services. Congress' focus was not on whether the state law claims challenged advertising. The allegations of Plaintiffs' complaint included, *inter alia*, Defendants passing off their telephones, services, and rates as another's, the likelihood of confusion or misunderstanding,

deceptive representations or designations, knowingly participating in, contributing to or accepting benefits of unfair and deceptive conduct, intent to induce use, and reliance on untrue, unfair, misleading or deceptive acts, conduct, omissions and misrepresentations. Protection against these frequent marketplace evils, as provided by the common law and state statutes, should not be wiped out by a state court's misguided foray into rewriting federal law and imagining into reality an intent that never existed.

II.

THE SAVING CLAUSE OF THE COMMUNICATIONS ACT IS CLEARLY APPLICABLE TO TOCSIA; ANY QUESTION IN THAT REGARD IS SUPPLANTED BY THE HARMONY BETWEEN THE RELIEF SOUGHT BY THESE PLAINTIFFS AND THE CONGRESSIONAL PURPOSE AND INTENT OF THE COMMUNICATIONS ACT AND TOCSIA.

TOCSIA was enacted in 1990 after the Communications Act and the related saving clause were already in effect. TOCSIA is part of the Communications Act and is equally subject to the Section 414 saving clause, as Congress did not modify Section 414 when it enacted TOCSIA as part of the Communications Act. By choosing not to modify Section 414 when it enacted TOCSIA, Congress indicated its intent that the saving clause apply to TOCSIA as well, an intent which was ignored by the appellate court. By ignoring the protection the saving clause affords state law claims from federal pre-emption under TOCSIA, the appellate court attempts to rewrite federal law.

The FCC stated in *In re OSPA* that "the Communications Act and TOCSIA independently establish Congress' intent to have this Commission exclusively regulate the *rates, terms, and conditions* of interstate operator services." 1991 FCC LEXIS 3735, at *7 (emphasis added). Thus, the Communications Act and TOCSIA share not only the same protection of state law claims under the saving clause, but the same area of exclusive federal pre-emption. The scope of exclusive federal pre-emption after the enactment of TOCSIA looks at the same standards as the Communications Act did prior to the enactment of TOCSIA (regulation of rates, terms and conditions). As there is a limited scope of federal pre-emption, common law duties clearly remain pursuable. *See Lohr*, 1996 U.S. LEXIS 4260, at *55 ("given the critical importance of device-specificity in our (and the FDA's) construction of [the statute] it is apparent that few, if any, common-law duties have been pre-empted by this statute."). Yet the appellate court fails to recognize such an interpretation of Congressional intent, and contrary to such intent, instead applies a general umbrella of federal pre-emption over the "entire field of operator services".

As already argued above, Congress did not expressly provide for complete federal pre-emption of state law claims under the Communications Act. Similarly, TOCSIA does not exercise complete pre-emption over state law claims either, due to Congress' maintenance of the saving clause, which limits TOCSIA in its pre-emptive reach over state law claims in the area of operator service providers. The fact that TOCSIA also specifically provides that its requirements regarding postings near telephones do not apply where states have regulations

substantially similar to TOCSIA indicates pre-emption was not intended to be complete. 47 U.S.C. § 226(c)(2). It must also be noted that TOCSIA's provision regarding rates sets no exact limits but essentially defers to marketplace forces subject to a review procedure. 47 U.S.C. § 226(h). It is not likely that Congress intended this reliance on the forces of the marketplace to be without the protection of local law; states are not completely pre-empted by TOCSIA as TOCSIA cannot defer to a lawless marketplace. Nevertheless, the appellate court incorrectly broadened the scope of federal pre-emption under TOCSIA by finding that complete federal pre-emption was implied.

Federal pre-emption may be implied when the objective of the federal law is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Fed'l Savings & Loan v. de la Cuesta*, 458 U.S. 141, 153 (1982). There are two ways in which federal pre-emption might be implied and applied over state law claims. Federal pre-emption by implication may exist where compliance with both state and federal law is an impossibility. *English v. Gen'l Elec. Co.*, 496 U.S. 72 (1990), *People v. Kerr-McGee Chem. Corp.*, 677 F.2d 571 (7th Cir. 1982), *cert. denied*, 459 U.S. 1049 (1982). Federal pre-emption by implication may also exist where state law "stands as an obstacle to the accomplishment and execution of [Congress'] full purposes and objectives." *Hines v. Davidowitz*, 312 U.S. 52 (1941).

This Court has determined that courts must "examine the Federal statute in question to determine whether Congress intended to supplant State laws on the same subject." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). However, the appellate court applied the

standards of implied pre-emption without considering the intent of Congress and without any consideration of the existence of the saving clause. In its blind application of complete federal pre-emption under TOCSIA, without consideration of the impact of the saving clause, the appellate court effectively took on the role of Congress in deciding legislation. The state has thus intruded on the territory of another governmental branch and acted in such a manner as to take away the long-standing common law rights and related general statutory rights from its citizens, rights which the federal government specifically sought to maintain and protect.

The appellate court basically determined that federal regulation in the area of operator services after the enactment of TOCSIA is so pervasive that the state cannot supplement it. (App. 11-14). The appellate court was overly broad in application of the scope of pre-emption by, *inter alia*, reading that *In re OSPA* supports the notion that TOCSIA pre-empts Plaintiffs' causes of action alleged under common law (App. 11). In fact, the FCC's findings in *In re OSPA* only serve to emphasize that the appellate court's determination is incorrect. The FCC in *In re OSPA* determined that the Tennessee statute at issue in the case was not protected from pre-emption under the saving clause because it sought to "establish the terms and conditions under which interstate operator services may be offered in the states . . . [and thus seeks] to assure the reasonableness of the rates, terms, and conditions of interstate communications services," and noted that the statute "did not concern remedies against interstate carriers based on statutory or common law remedies preserved under Section 414, such as a consumer's ability to sue . . . for common law fraud or misrepre-

sentation." 1991 FCC LEXIS 3735, at *11. Therefore, Plaintiffs' claims under state law are protected from pre-emption, as *In re OSPA*'s recognition of state remedies clearly supports the assertion that claims under state and federal law can exist concurrently in the area of operator services.

The appellate court effectively found there was complete federal pre-emption over state law claims by misapplying TOCSIA and refusing to apply the § 414 saving clause to Plaintiffs' claims. This is evidenced by its statement that even if "plaintiffs' objective was to address the 'striking similarity of the telephones [which] lulls the plaintiffs and consuming public into believing that they are using Bell telephones' . . . [a]llowing State action in this arena would stand as an obstacle to the accomplishment of Congress's goals and objectives . . ." in holding that TOCSIA pre-empts the state law claims. (App. 13). Thus, the appellate court effectively refused to recognize the viability of state law claims and formulated a holding which allows pre-emption of state law claims even if they are not challenging rates, terms or conditions. The court failed to analyze each of Plaintiffs' causes of action individually, instead choosing to apply a general application of pre-emption. The appellate court never articulated or elaborated on how Plaintiffs' claims stood as an obstacle to Congress' goals and objectives, which were to "protect consumers who make interstate operator services calls from pay telephones, hotels, and other public locations against unreasonably high rates and anticompetitive practices." S. Rep. No. 439, 101st Cong., 2d Sess. 1 (1990). In reality, the appellate court could not so elaborate, as Plaintiffs' pursuit of available rights supports

and is in furtherance of the underlying Congressional intent and does not interfere or conflict with Congress.

The appellate court decided TOCSIA completely pre-empted the area of operator services by asserting that although "TOCSIA did not set any standards regarding the position or appearance of public telephones" the area was still governed by federal law, and not left open to the States. (App. 13). This analysis is another attempt to broaden the scope of implied federal pre-emption, in direct conflict with Congressional intent. As stated earlier, implied pre-emption exists where state law conflicts with federal law, either through impossibility of complying with both state and federal requirements or where state law stands as an obstacle to the accomplishment of the federal purpose. As confirmed by the appellate court, no standards exist under TOCSIA regarding the position or appearance of public telephones. It is precisely the deceptive position or appearance of public telephones which Plaintiffs challenge under state common law; thus, "it is not impossible for petitioners to comply with both federal and state law because there is no federal standard for a private party to comply with." *Freightliner Corp. v. Myrick*, 514 U.S. ___, 1995 U.S. LEXIS 2841, at *17 (1995). Had the proper analysis been applied to Plaintiffs' claims, the court would have found that as compliance under both state and federal law was possible, there was no pre-emption.

Notably, this Court has held that the absence of a regulation does not indicate an affirmative decision on the part of the federal government that regulation in the area is not approved. *Freightliner*, 1995 U.S. LEXIS 2841, at *12. Thus, the appellate court contradicted this Court's position by finding that the absence of federal

regulation under TOCSIA regarding the positioning or appearance of public telephones nevertheless meant that the area was not left open to the states. (App. 13). There is no such evidence that Congress, in enacting TOCSIA, meant to keep the area of operator services free from all state regulation. In fact, the intent of Congress appears to indicate the opposite, in light of its maintenance of the saving clause. Therefore, the appellate court's finding that Plaintiffs' state law claims would conflict with federal law was contrary to the position of this Court and counter to the intent of Congress.

In the case before this Court, Plaintiffs are seeking remedies which are generally applicable to all those who would deal with the public, not just operator services. Plaintiffs are not infringing on the standards set by Congress for the operator services. The appellate court must follow its own claim that "[i]t is not for the States to enlarge on the methods employed by Congress" (App. 14) and should not enlarge on the scope of federal preemption which has been set forth by Congress. No state court should be permitted to engage in an abuse of preemption which destroys the common law and statutory rights of its citizens.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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No. 80293 - John Manning et al., petitioners, v. City of Chicago et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 25, 1996.

First Division
November 13, 1995

No. 1-93-3647

JOHN MANNING and DEAN ZELINSKY,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, THE OXFORD HOUSE, ZERO PLUS DIALING, INC., RESURGENS COMMUNICATIONS GROUP, INC. INTERNATIONAL TELECHARGE, INC. OPERATOR ASSISTANCE NETWORK, INC., SHEFFIELD SYSTEMS, INC., PEOPLE'S TELEPHONE CO., INC., TELECOM*USA, and ILLINOIS BELL TELEPHONE COMPANY,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County.
Honorable Thomas J. O'Brien, Judge Presiding.

JUSTICE WOLFSON delivered the opinion of the court:

Someone wants to make a long distance call from a telephone in a public place. He or she reaches for the phone. At that moment, the caller does not know which phone service will be handling the call.

The question is whether that caller, claiming confusion and deception, can sue everyone connected with processing the call for injunctive relief and money damages in a State court.

The trial court found there is no claim because Congress preempted the field. We agree.

BACKGROUND

Before 1982, almost all long distance telephone service in this country was provided by AT&T. The change came in 1982, when the United States and AT&T entered into a consent decree. Among other things, the decree required AT&T to divest itself of its local telephone companies and allow all long distance carriers equal access to local interconnections.

These changes brought competition to the operator service industry. They also brought customer confusion because some operator service providers did not identify themselves to callers who made operator-assisted calls over certain public phones. At times, consumers could not reach the carrier they wanted. Rates charged by providers were uneven, some much higher than the rates charged by AT&T for interstate calls.

This history is contained in Senate Report No. 439, 101st Cong., 2d Sess. (1990) (Sen. Rpt.). To respond to these and other concerns, Congress, in 1990, enacted the Telephone Operator Consumer Services Improvement Act (TOCSIA), 47 U.S.C. §226 (1991).

On December 11, 1992, plaintiffs filed a four-count class action complaint charging defendants with fraud and deceptive trade practices in violation of State statutory and common law.

According to the complaint, certain defendants (as well as others not yet named or known), identified as "aggre-

gators," are entities who own, operate, control, maintain, or provide public pay telephones on their premises.

These aggregators contracted with other defendants, known as Alternative Operator Service Providers or AOSPs, who are non-Bell phone service companies, to provide operator-assisted (live or automated) phone service for their public phones. The aggregators continued to use Bell telephones, or similar-looking Bell-type telephones, and kept the public telephones in the same or substantially the same locations as when the underlying operator-assistance carrier for the public telephones was AT&T or a Bell Operating Company (BOC).

In so doing, plaintiffs claim, aggregators were "passing off" AOSP telephones, services, and rates as those of AT&T or Bell Operating Companies and were thereby creating a misunderstanding or confusion as to the source of the telephone service and the rates charged. According to the complaint, the damage to plaintiffs caused by this "passing off" arose from the fact that AOSPs generally charge higher rates than AT&T or BOCs and the consumer would often be unaware that another carrier had placed the call until the consumer received his/her telephone bill.

Plaintiffs requested temporary and permanent injunctive relief, as well as money damages. In particular, they requested that defendants be enjoined from charging non-BOC rates at BOC-shared or "BOC-type" telephones and that Bell be enjoined from billing or collecting for telephone services on behalf of AOSPs.

In response to the complaint, Telecom*USA and Resurgens Communications Group, Inc. (Resurgens) filed a section 2-619 motion to dismiss the complaint (735 ILCS

5/2-619 (West 1992)), arguing that the claims were preempted by the Federal Communications Act (47 U.S.C. §151 *et seq.*) and the Telephone Operator Consumer Services Improvement Act (TOCSIA) (47 U.S.C. §226).

The City of Chicago (City), responded by filing a section 2-615 motion requesting greater specificity in the complaint. (735 ILCS 5/2-615 (West 1992).) Illinois Bell Telephone Company (Illinois Bell), Operator Assistance Network (OAN), International Telecharge, Inc. (ITI), Sheffield Systems, Inc., (Sheffield) and The Oxford House (Oxford House) all filed section 2-615 motions, seeking dismissal for failure to state a cause of action. Zero Plus Dialing, Inc. (ZPDI) moved for summary judgment.

On July 14, 1993, the trial court held a hearing on the 2-619 motions, without considering the pending 2-615 motions or the motion for summary judgment. After hearing argument, the trial court dismissed the complaint with prejudice as to all defendants, finding that the claims were preempted by Federal law.[1]

---

[1] The Federal Communications Act and TOCSIA are limited to interstate communications. To the extent that plaintiffs' complaint addresses intrastate communications, defendants argued that the claims were preempted by the Illinois Public Utilities Act. (220 ILSC 5/13-901 (West 1992).) The trial court, however, refused to hear argument on this point, indicating that it was unnecessary. In their opening brief before this court, plaintiffs did not address intrastate communications or the defendants' argument concerning preemption by the Public Utilities Act. For this reason, any argument regarding intrastate communications is waived. See *Greer v. IHDA* (1988), 122 Ill. 2d 462, 524 N.E.2d 561; Illinois Supreme Court Rule 341(e)(7).

Plaintiffs moved to vacate the dismissal order and for leave to file an amended complaint. The motions were denied on September 17, 1993, and this appeal followed.

ISSUES

Plaintiffs present two issues:

(1) Whether the State statutory and common law causes of action pled in plaintiffs' complaint are preempted by the Federal Communications Act and the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA).

(2) Whether plaintiffs should have been granted leave to amend their complaint.

PREEMPTION

Under the supremacy clause of the United States Constitution, State law that interferes with or is contrary to Federal law, is preempted. (*Schwartzkopf v. National RR Passenger Corp. (1988),* 178 Ill. App. 3d 226, 532 N.E.2d 1333.)

State action may be invalid even when the State law is not inconsistent with Federal law, if it is in "an area of interstate commerce intended by Congress for exclusive federal regulation." *In re OSPA (1991),* 6 F.C.C.R. 4475.

Congressional intent is the "ultimate touchstone" of any preemption analysis. *(Paul E. Malone, Laverne Malone d/b/a Malone Farms v. American Cyanamid Co. (1995),* 271 Ill. App. 3d 843, 649 N.E.2d 493, quoting *Cipollone v. Liggett Group, Inc. (1992),* 505 U.S. 504, 120

L. Ed. 2d 407, 422, 112 S. Ct. 2608, 2617.) In other words, the "key inquiry" is whether Congress, by enacting a particular statute, "intended to supplant State law on the same subject." *Kellerman v. MCI Telecommunications Corp. (1986),* 112 Ill. 2d 428, 438, 493 N.E.2d 1045.

Since Congress rarely includes explicit preemptive language in the statute, preemptive intent must often be "divined" by the courts. *(Kellerman,* 112 Ill. 2d at 438). When divining preemptive intent, courts should consider whether "the scheme of federal regulation" or "the object sought to be obtained by the federal law and the character of obligations imposed" is so pervasive that it "raises the reasonable inference that Congress left no room for the States to supplement it." *Kellerman,* 112 Ill. 2d at 438, quoting *Fidelity Savings & Loan Association v. De la Cuesta (1982),* 458 U.S. 141, 153, 73 L. Ed. 2d 664, 675, 102 S. Ct. 3014, 3022. If so, State regulation is superseded altogether.

> "Even where Congress has not completely displaced state regulation in a specific area, State law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility' [citation] or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'***" *Fidelity Federal Savings & Loan Association,* 458 U.S. at 153, 73 L. Ed. 2d at 675, 102 S. Ct. at 3022.

Applying these basic principles, the *Kellerman* court considered whether the Federal Communications Act (Act) preempted the entire field of long distance telephone service, to the exclusion of State law. The court concluded that State regulation of interstate telephone

carriers was not supplanted if it was unrelated to "Congress' objective of creating an interstate telephone network that is rapid, efficient and reasonably priced." *Kellerman,* 112 Ill. 2d at 440-41.) This conclusion was based on Congress' inclusion of section 414, a saving clause, within the Act.

Section 414 of the Act states:

> "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

In light of this provision, the *Kellerman* court held that "State law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414 [of the Communications Act]." *(Kellerman,* 112 Ill. 2d at 443.) Because the State law claims involved fraudulent and deceptive advertising about the cost of long distance phone services and did not involve the quality or use of phone services, or the reasonableness of rates, they were held not to be preempted.

Four years after *Kellerman* was decided, Congress enacted TOCSIA. TOCSIA was Congress' response to numerous consumer complaints regarding the deceptive practices of AOSPs. Congress found that "consumers" complain that they are being denied access to the carrier of their choice, they are deceived about the identity of the carrier providing their operator services and about the rates for the call, they lack information on how they can complain, and they are being deprived of their free choice." (TOCSIA, Pub. L. 101-435, Senate Report No. 101-439 at 1586.) After setting forth an historical over-

view of the developments in the operator services industry and the complaints by consumers, the Senate concluded that "[t]his legislation will ensure that each consumer is given the information and opportunity to make an informed choice of the desired operator service carrier." Senate Report No. 101-439 at 1581.

The express purpose for the legislation was to "protect consumers who make interstate operator service calls from pay telephones, hotels, and other public locations against unreasonably high rates and anticompetitive practices." (TOCSIA, Pub. L. 101-435, Senate Report No. 101-439 at 1577.) Congress further explained that the goal of the legislation was "to protect consumers from the problems caused by the entrance of these new carriers while avoiding overly stringent regulation that could harm the development of a competitive operator services market." TOCSIA, Pub. L. 101-435, Senate Report No. 101-439 at 1581.

Senate Report No. 101-439 spells out the intent of Congress. The purpose of TOCSIA was to end deceptive practices by telephone service providers and to grant consumers the opportunity to make informed choices regarding telephone services. That, of course, is what this lawsuit is all about.

The method used by Congress to achieve its goal was three-pronged. First, it set minimum standards for OSPs (Operator Service Providers), requiring them to (1) immediately identify themselves to the consumer and allow the consumer to terminate the call without incurring any charge, (2) not bill for uncompleted calls, (3) disclose, upon request, its rates, methods of collection, and a number where complaints may be filed, and (4) ensure that

aggregators do not "block" consumers from reaching a different operator service carrier. 47 U.S.C. §226(b)(1).

Second, TOCSIA required aggregators to: (1) post information, on or near the telephone, which identifies the OSP for that phone, informs the consumer of the right to access a different carrier, and lists the number for the consumer affairs division of the FCC, (2) provide access to "950" and "800" numbers at cost equal to "0+" calls. 47 U.S.C. §226(c)(1).

Third, TOCSIA required the FCC to conduct a rulemaking proceeding to "prescribe regulations to (A) protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate calls; and (B) ensure that consumers have the opportunity to make informed choices in making such calls." (47 U.S.C. §226(d)(1).) At a minimum, the FCC was to establish a policy for requiring OSPs to publicize the changes in operator services and the choices available to consumers. 47 U.S.C. §226(d)(4).

TOCSIA, then, represents a broad statement of national policy. It encourages competition while avoiding confusion and deception.

The FCC, which was given the power to promulgate whatever regulations it determined to be necessary for implementing the purpose and policies of the Act, had an opportunity to consider the preemptive reach of TOCSIA when it was called upon to determine the validity of a Tennessee statute. The statute required OSPs whose rates were greater than AT&T's rates to identify themselves, states the cost of their services, and offer to transfer the customer to another carrier without charge.

Invalidating the Tennessee statute, the FCC found that TOCSIA is Congress' "comprehensive legislative solution to any problem in the interstate OSP industry." *(In re OSPA (1991),* 6 F.C.C.R. 4475.) By enacting the Communications Act and TOCSIA, said the FCC, Congress intended that Federal requirements would displace State requirements applicable to interstate operator services. *(In re OSPA,* 6 F.C.C.R. at 4475.) Not only did the Tennessee statute conflict with congressional intent, it also stood "as an obstacle to the achievement of federal objectives." *In re OSPA,* 6 F.C.C.R. at 4476.

Since the FCC was commissioned by Congress to promulgate regulations to implement the policies and purpose of TOCSIA, its decision in *In Re OSPA* should be given considerable weight. We conclude, as the trial court did, that *In re OSPA* provides strong support for the notion that TOCSIA preempts any State action which addresses rates, terms, and conditions of interstate communications services, including deceptive practices of OSPs which contribute to consumer confusion.

Whether plaintiffs' cause of action alleged violation of the Illinois Uniform Deceptive Trade Practices Act, the Illinois Consumer Fraud and Deceptive Business Practices Act, or common law deceptive practice or fraud, plaintiffs requested injunctive relief "prohibiting the charging of non-BOC rates at BOC-shared or BOC-type telephones" and an injunction prohibiting Illinois Bell from billing or collecting on behalf of AOSPs. Clearly, plaintiffs were seeking to address the rates, terms, and conditions of interstate operator services, although their

lawsuit was framed in terms of "passing off."[2] Therefore, the causes of action are preempted.

Plaintiffs contend on appeal that their complaint addressed the deceptive "trade dress" issue, which is distinct from the issues addressed by TOCSIA. Their cause of action, plaintiffs say, deals with the manner in which aggregators and AOSPs use positioning and appearance of public pay phones to confuse and mislead the public into believing that they were continuing to receive Bell or AT&T phone service. They contend their objective is not the "strengthening of defendants' notices, changing of their rates, or modification of their telecommunications practices."

Plaintiffs try to equate this "trade dress" issue with advertising in an attempt to bring this cause within the narrow exception recognized in *Kellerman*. Plaintiffs' argument misses the mark. It is clear that the focus of the original complaint is not advertising of services, rates, or promotions. Nowhere in the prayer for relief do plaintiffs even mention the physical appearance or location of the public phones.

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[2] Plaintiffs contend on appeal that any effect on rates and service is tangential or tenuous, citing to *Wolens v. American Airlines, Inc. (1993)*, 157 Ill. 2d 466, 626 N.E.2d 206. In *Wolens* the Illinois Supreme Court held that a Consumer Fraud count was not preempted by the Airline Deregulation Act (ADA).

But the United States Supreme Court reversed in *American Airlines, Inc. v. Wolens (1995)*, ___ U.S. ___, 130 L. Ed. 2d 715, 115 S. Ct. 817, specifically rejecting the Illinois Supreme Court's reasoning. The Court held that the term "related to rates" within ADA's preemption clause meant *any* effect on rates and did not countenance the separation of "essential" from "unessential" matters.

Even if we were to agree that plaintiffs' objective was to address the "striking physical similarity of the telephones [which] lulls the plaintiffs and consuming public into believing that they are using Bell telephones providing Bell rates and services," the claims would be preempted. Eliminating the public's confusion is the "object sought to be obtained" by Congress by enacting TOCSIA. *(Kellerman,* 112 Ill. 2d at 438.) Allowing State action in this arena would stand as an obstacle to the accomplishment of Congress's goals and objectives because differing local rules regarding operator services would ultimately add to consumer confusion, not diminish it. *Kellerman* does not help the plaintiffs because the claims in that case had nothing to do with the use of the phones. Rather, they were confined to the advertising about the cost of the long distance calls.

The fact that TOCSIA did not set standards regarding the positioning or appearance of public telephones does not mean that these areas are left open to the States. The obligations imposed on aggregators and AOSPs by TOCSIA are deemed sufficient by Congress to accomplish the goal of reducing consumer confusion. See Telephone Operator Consumer Services Improvement Act of 1990, Final Report, November 13, 1992, wherein the FCC concluded:

> "The statutory objectives of TOCSIA are being achieved. Consumers are being protected from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. Further, consumers have an opportunity to make informed choices in making calls."

It is not for the States to enlarge on the methods employed by Congress. For this reason, we find that State action in this area is preempted by Federal law.

AMENDMENT OF THE COMPLAINT

Plaintiffs also contend that the trial court should have vacated its order dismissing the case and allowed an amended complaint to be filed.

As the trial court found, the amended complaint was nothing more than a cosmetically-altered version of the original complaint. It attempted to charge Illinois Bell with a failure to timely advertise the insurgence of AOSPs. But, as stated earlier, the FCC was required to establish a policy whereby AOSPs were to publicize their services. Therefore, plaintiffs' amending of their complaint does not change our finding that the objectives they seek to address are preempted by Federal law.

Based upon our finding that the entire field of operator services is preempted by Federal law, plaintiffs could not have stated a cause of action. Amendment of their claim would have been fruitless.

CONCLUSION

The judgment entered by the trial court is affirmed. Because the finding of preemption disposes of the entire case, we do not reach the other arguments made by some defendants.

AFFIRMED.

BUCKLEY and BRADEN, JJ., concur.

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

JOHN MANNING and DEAN ZELINSKY, Plaintiffs,	)	
v.	)	NO. 92 CH 11891
CITY OF CHICAGO, et al., Defendants.	)	

ORDER

THIS CAUSE coming to be heard on Plaintiffs' motions to vacate the Court's July 14, 1992 order dismissing the case with prejudice and for leave to file their first amended complaint after oral argument and the Court being fully advised in the premises:

IT IS HEREBY ORDERED THAT:

1) Plaintiffs' motion to vacate this Court's July 14, 1992 order is denied,

2) Plaintiff's motion for leave to file their first amended complaint is denied for the reasons stated in the Court's memorandum of opinion.

ENTER:

ENTERED
SEP 17, 1993
T. O'BRIEN 139

[September 17, 1993]

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT,
CHANCERY DIVISION

JOHN MANNING and DEAN ZELINSKY,

Plaintiffs,

v.

CITY OF CHICAGO, THE OXFORD HOUSE, ZERO PLUS DIALING, INC., RESURGENS COMMUNICATIONS GROUP, INC., INTERNATIONAL TELECHARGE, INC., PEOPLE'S TELEPHONE CO., INC., TELECOM*USA and ILLINOIS BELL TELEPHONE COMPANY,

Defendants.

No. 92 CH 11891
Judge Thomas J. O'Brien

MEMORANDUM OF OPINION

THOMAS J. O'BRIEN, Circuit Judge:

The Court heretofore struck and dismissed Plaintiffs' complaint for class action against all Defendants for the reasons stated in open court.

Although the Court entered a final and appealable order, Plaintiffs timely moved to vacate the dismissal order claiming "the Court's reasoning for the dismissal is based on an overly narrow and improper application of the Illinois Supreme Court's decision in *Kellerman v.*

MCI Telecommunications, 112 Ill. 2d 428 (1986), . . . and an overbroad and improper interpretation of *In re OSPA*, 1991 FCC Lexis 3735, on the federal preemption issue." The Plaintiffs also moved for leave to file an Amended Class Action Complaint adding additional allegations of "deceptive and fraudulent conduct by Defendants" independent of the Plaintiffs' direct use of BOC-type or BOC-shared public telephones.

At the hearing on Plaintiffs motions, the Court denied Plaintiffs' first motion and held that this Court's original interpretation of both *Kellerman* and *OSPA* was correct.

After requiring Plaintiffs to specifically delineate the new allegations in their amended complaint and after hearing argument on the issue of leave to file same, the Court took Plaintiffs' motion for leave to file an amended complaint under advisement.

The requirement for alleging a cause of action in Illinois state courts are well settled. A complaint must state facts essential to a cause of action; notice pleading is not sufficient. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407 (1981). Contrary to some expressions by a few courts indicating a complaint is competent if it generally informs the defendant of the nature of the claim, such statements are but a part of pleading requirements. As stated in *Knox College*, "Although . . . allegations . . . may generally inform (defendant) of the nature of the claim it will be called upon to defend, it must be kept in mind that Sec. 42(2) of the Civil Practice Act (now Ill. Rev. Stat. ch. 110, par. 612(b) (1992)) does not relieve [pleader] of the obligating to plead facts and not conclusions. . . ." *Knox College*, 83 Ill. 2d at 426.

Also, where plaintiffs base their cause of action on fraud (as they attempt to do in Count IV of the proposed amended complaint), those allegations must be pleaded with specificity, particularity and certainty. *Goldberg v. Goldberg*, 103 Ill. App. 3d 584, 588 (1st Dist. 1982).

With these principles in mind, the Court has reviewed Plaintiffs' proposed amended complaint.

To avoid the application of *In re OSPA* and come within the purview of *Kellerman*, Plaintiffs have added allegations (although many are mere conclusions) attempting to shift the wrongful actions of one or more Defendants away from the actual "use transaction" of the telephone and the transmissions. Plaintiffs further allege *inter alia* that one or more Defendants had a duty not to create a deception among telephone users and/or a duty to otherwise cease advertising that one or more Defendants was a near exclusive source of pay telephone service.

The Court has considered the new allegations and particularly, but not limited to, the allegations contained in paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26 and 27 of Plaintiffs' amended complaint. The Court believes the amended complaint must be dismissed because even accepting those surviving non-conclusory allegations as true, the Court holds the doctrine of preemption as announced in *In re OSPA* prohibits the recognition of this cause of action by a state court.

Furthermore, the Court finds that the amended allegations do not state a cause of action within the narrow factual situation found in *Kellerman*. While Plaintiffs have deftly added allegations that seek to move the alleged wrongful conduct of one or more Defendants away from the area of telephone use and operator ser-

vices so as to come within the scope of *Kellerman*, this Court believes Plaintiffs merely create a distinction without a difference.

As stated in *In re OSPA*, Congress enacted the Federal Statute known as the Telephone Operator Consumer Services Improvement Act of 1990 as part of a comprehensive effort to solve certain recurrent problems in the interstate OSP industry:

> TOCSIA and its legislative history make clear that Congress viewed TOCSIA as establishing a "regulatory framework" for the interstate operator services industry, and as filling a need for comprehensive solutions that it believed the Commission's previous proceedings had failed to provide. As indicated, to implement this framework, *the statute establishes a broad range of requirements governing the industry*, in addition to the specific matters addressed by Tennessee, and directs the Commission to conduct "general" rulemaking to establish rules *that will protect consumers from unfair and deceptive practices in their use of operator services to place interstate telephone calls*. Thus, *it is apparent that congress intended to, and did, create a comprehensive legislative solution* to any problems in the interstate OSP industry . . . a federal solution *that precludes a potpourri of differing state requirements applicable to interstate services*. Accordingly, under the regulatory framework established by Congress in TOCSIA, the Tennessee statute may not apply to interstate operator services. (Emphasis added.)

Thus the Act was held to preclude the application of a Tennessee statute attempting to set forth certain requirements governing the provisions of intrastate and interstate operator assisted service.

The Federal Commerce Commission, therefore, found TOCSIA precluded application of the Tennessee statute and concluded:

> [W]e emphasize that we share with state authorities the broad goals of protecting consumers who use operator services from unfair and unreasonable rates and practices. As determined by Congress, however, the authority to pursue these goals for interstate operator services resides with this Commission and not with state authorities. Of course, we here only reassert federal authority over interstate operator services. We do not address intrastate operator services, which are subject to regulation by state authorities.

Even if the wrongful conduct of one or more of the Defendants is interpreted as to have occurred "away" from the use of the phone or the conduct of operator services (because of some independent duty upon one or more Defendants to make some sort of disclosure in the media or in their billing statements), such would make that conduct "actionable" when in fact the underlying conduct associated with the phone use or operator services never could be determined to be deceptive or wrong because of the preemption doctrine announced in *OSPA*. In other words, state courts would be holding providers liable for failing to make disclosures or causing confusion based upon acts and conduct state courts had no authority to regulate.

Played out to its inevitable conclusion, interstate phone service would be subject to the myriad and mutually conflicting requirements of various state laws. This would seem to be the precise scenario that led *OSPA* to conclude the following:

> [W]e have found that the Communications Act and TOCSIA preclude application of the Tennessee statute to interstate operator services because those statutes have established a comprehensive scheme of federal regulation over interstate operator services and because application of the Tennessee statute to such services would stand as an obstacle to achievement of federal objectives. Accordingly, we declare that OSPs are not required to comply with the Tennessee statute to the extent Tennessee authorities seek to apply it to interstate operator services.

The above conclusion, of course, does not leave Plaintiffs remediless. All that it does is require them to alleviate the effect of the alleged *wrongful conduct* in another and more expert and efficient forum.

Plaintiffs' motion for leave to file their amended complaint is denied.

Draft order instanter consistent with the above ruling.

ENTERED:

SEP 17 1993

T. O'BRIEN 139

JUDGE THOMAS J. O'BRIEN

TJOB/pw

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

MANNING, et al.	)	
	)	
v.	)	No. 92 CH 11891
	)	
CITY OF CHICAGO, et al.	)	

ENTERED
JUL 14 1993
T. O'BRIEN 139

ORDER

THIS MATTER coming to be heard on defendant's motions to dismiss under Section 2-619 of Illinois Code of Civil Procedure, and the Court being fully advised in the premises:

IT IS HEREBY ORDERED THAT the Class Action Complaint is dismissed with prejudice.

_____, 19_____

ENTER:

/s/ Thomas J. O'Brien
Judge Judge's No.

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Supreme Court, U.S.
FILED
AUG 7 1996
CLERK

No. 96-32

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOHN MANNING and DEAN ZELINSKY,
Petitioners,
v.

CITY OF CHICAGO, THE OXFORD HOUSE, ZERO PLUS DIALING, INC., RESURGENS COMMUNICATIONS GROUP, INC., INTERNATIONAL TELECHARGE, INC., OPERATOR ASSISTANCE NETWORK, SHEFFIELD SYSTEMS, INC., PEOPLE'S TELEPHONE CO., INC., TELECOM*USA, and ILLINOIS BELL TELEPHONE COMPANY,
Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

BRIEF FOR RESPONDENT TELECOM*USA IN OPPOSITION

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19 pp

RULE 29.6 STATEMENT

Telecom*USA is a wholly owned subsidiary of MCI Financial Management Corporation. MCI Financial Management Corporation is a wholly owned subsidiary of MCI Communications Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-32

JOHN MANNING and DEAN ZELINSKY,
Petitioners,

v.

CITY OF CHICAGO, THE OXFORD HOUSE, ZERO PLUS DIALING, INC., RESURGENS COMMUNICATIONS GROUP, INC., INTERNATIONAL TELECHARGE, INC., OPERATOR ASSISTANCE NETWORK, SHEFFIELD SYSTEMS, INC., PEOPLE'S TELEPHONE CO., INC., TELECOM*USA, and ILLINOIS BELL TELEPHONE COMPANY,
Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

---

BRIEF FOR RESPONDENT TELECOM*USA IN OPPOSITION

Respondent Telecom*USA respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment and opinion of the Appellate Court of Illinois, First District, entered in this case on November 13, 1995.

STATEMENT OF THE CASE

A. Federal Regulation of Operator Services

Until 1982, virtually all interstate long distance telecommunications services in this country were provided by American Telephone & Telegraph Company ("AT&T").

In 1982, the United States and AT&T entered into a consent decree which, among other things, required AT&T to divest itself of its local telephone companies and ordered that all long distance carriers be given "equal access" to local telephone interconnections. *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 232-33 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States,* 460 US. 1001 (1983). As a result, all telephone customers, including those who own or operate public phones, are able to select (or "presubscribe") to one of the many long distance carriers now competing in what was once an AT&T-dominated industry.

These sweeping changes also brought competition to the operator service industry. Telecom*USA works within this industry providing live or automated operator-assisted long distance service in competition with AT&T and others. Operator-assisted service includes, for example, calls billed to a calling card, collect calls and calls charged to a third party. Just like consumers who can presubscribe to long distance providers, those who own, operate, maintain or control telephones which are made available to the public—known as "aggregators"—may presubscribe to the long distance provider and operator service provider ("OSP") of their choice. When a caller using one of these public phones dials "0" or "1" plus a phone number, the call is automatically routed to the presubscribed OSP selected by the aggregator.

This new competition initially created customer confusion because some OSPs failed to identify themselves to consumers who made operator-assisted calls over a public phone presubscribed to an OSP. S. Rep. No. 439, 101st Cong., 2d Sess. (1990) (hereinafter "Sen. Rpt.") Consumers sometimes could not override the presubscribed OSP and reach the carrier they wanted to use. Some OSPs charged rates higher than those charged by AT&T for its interstate calls.

In response, Congress in 1990 enacted the Telephone Operator Consumer Services Improvement Act

("TOCSIA"). Congress noted that "[t]he States have supported federal legislation because they do not have jurisdiction over interstate calls, which represent the majority of operator services calls." Sen. Rpt. at 4. To "ensure that each consumer is given the information and opportunity to make an informed choice of the desired operator services carrier" (Sen. Rpt. at 5), TOCSIA requires every OSP to:

> (A) identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call;
>
> (B) permit the consumer to terminate the telephone call at no charge before the call is connected;
>
> (C) disclose immediately to the consumer, upon request and at no charge to the consumer—
>
> (i) a quote of its rates or charges for the call;
>
> (ii) the methods by which such rates or charges will be collected; and
>
> (iii) the methods by which complaints concerning such rates, charges, or collection practices will be resolved . . . .

47 U.S.C. §§ 226(b)(1)(A)-(C). TOCSIA also requires OSPs to file informational tariffs with the FCC that specify, among other things, the rates, terms and conditions relating to operator-assisted calls. 47 U.S.C. § 226(h)(1). The FCC reviews these informational tariffs to determine whether OSP rates and charges are "unjust or unreasonable." 47 U.S.C. § 226(h)(2).

TOCSIA also regulates the aggregators who control public telephones to assist callers in making informed choices among OSPs before the caller incurs any charge for a call. Aggregators must post information on each public telephone which: 1) identifies the OSP serving that telephone; 2) informs the consumer of the right to

obtain access to another carrier; and 3) includes the telephone number of the consumer affairs division of the FCC. 47 U.S.C. § 226(c)(1)(A). Congress also ordered aggregators to ensure that public telephones accept access which enable callers to place a call with the long distance company of their choice. 47 U.S.C. §§ 226(c)(1)(B), (C).

Congress recognized, however, that these direct consumer protections were only part of the national telecommunications policy it wanted to implement. Eliminating the existing AT&T domination of the OSP market was also national policy. Thus, Congress' goals were to "ensure that each consumer is given the information and opportunity to make an informed choice of the desired operator services carrier" while "*avoiding overly stringent regulation* that could harm the development of a competitive operator services market." Sen. Rpt. at 5 (emphasis added).

Finally, Congress charged the FCC with the responsibility for developing all necessary regulations under TOCSIA to protect consumers "from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls and . . . ensure that consumers have the opportunity to make informed choices in making such calls." 47 U.S.C. §§ 226(d)(1)(A), (B). Pursuant to Congress' direction, on April 23, 1991, the FCC promulgated regulations that impose a broad range of requirements consistent with the goals of the statute. *See* 56 Fed. Reg. 18519. These regulations include specific posting requirements for aggregator telephones, rules prohibiting aggregators from blocking access to other long distance companies and detailed rules specifying the manner in which an OSP must identify itself before the consumer incurs any charge. *Id.* at 18521-22.

In November 1992, the FCC, as the agency charged with implementing TOCSIA, reported to Congress that

"[t]he statutory objectives of TOCSIA are being achieved. Consumers are being protected from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. Further, consumers have an opportunity to make informed choices in making such calls." *Final Report Pursuant to the Telephone Operator Consumer Services Improvement Act of 1990* (November 13, 1992) at 1.

B. The Proceedings Below

On December 11, 1992, petitioners filed a purported class action complaint alleging that respondent and other OSPs violated Illinois statutory and common law by providing "non-BOC [Bell Operating Company]" interstate long distance services and rates from public telephones. Specifically, the complaint alleged that OSPs fraudulently "passed off" their rates and services as those of AT&T and failed to inform petitioners of the "source, sponsorship, approval, services or rates provided at the telephone." Petitioners alleged that as a result of this conduct they were charged a higher rate than AT&T would have charged for the interstate long distance calls they placed from public telephones.

The complaint sought an injunction regulating the OSPs' future rates and requiring all competitors in the OSP industry to charge the same rates for interstate long distance calls, together with a refund of charges they had paid for long distance services in the past. Finally, petitioners sought a permanent injunction requiring the OSP defendants to "warn [consumers] of the sources of their product or service and the charges therefore." *

On July 14, 1993, the circuit court dismissed the complaint on the ground that it was preempted by the Federal

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* Petitioners did not include the complaint in the appendix to the petition for certiorari. The complaint specifically sought "an injunction enjoining the Defendants from billing and collecting non-BOC rates at BOC-shared or BOC-type telephones," and a "refund to the Plaintiffs [of] all money spent for said charges alleged herein." (Complaint pp. 8-9).

Communications Act, 47 U.S.C. § 151, et seq., and the Telephone Operator Consumer Services Improvement Act ("TOCSIA"), 47 U.S.C. § 226. On September 17, 1993, the court denied petitioners' motions to vacate the dismissal order and for leave to file an amended complaint. The court recognized that if state courts allowed challenges to the identification practices of OSPs, "interstate phone service would be subject to the myriad and mutually conflicting requirements of various state laws" and would thereby defeat the very purpose of TOCSIA. (Pet. App. 20)

On November 13, 1995, the Appellate Court of Illinois, First District, affirmed the circuit court's order. Noting that "[c]ongressional intent is the 'ultimate touchstone' of any preemption analysis," (Pet. App. 6), the appeals court examined TOCSIA's statutory scheme and legislative history. The court first noted that:

> "Senate Report No. 101-439 spells out the intent of Congress. The purpose of TOCSIA was to end deceptive practices by telephone service providers and to grant consumers the opportunity to make informed choices regarding telephone services. That, of course, is what this lawsuit is all about."

(Pet. App. 9.)

The court then addressed the specific requirements set forth in TOCSIA and its implementing regulations. (Pet. App. 9-10) These include requiring OSPs to immediately identify themselves to the consumer and allow the consumer to terminate the call without incurring any charge; not bill for uncompleted calls; disclose, upon request, its rates, methods of collection, and a number where complaints may be filed, and ensure that consumers have access to alternative interstate carriers. The court also correctly pointed out that TOCSIA imposed requirements on aggregators designed to avoid consumer confusion, including the posting on or near the telephone of the identity of the OSP servicing that phone.

Against this backdrop, the court next studied petitioners' complaint to determine whether the causes of action and remedies requested therein conflict with Congress' legislative solution to the potentially deceptive identification and billing practices of OSPs. (Pet. App. 11-14.) The court found that petitioners' requested injunctive relief prohibiting OSPs from charging anything other than AT&T long distance rates and prohibiting Illinois Bell from billing or collecting on behalf of OSPs were direct attempts to dictate the rates, terms and conditions of OSPs, subjects within the exclusive domain of federal law.

Finally, the court rejected petitioners' attempt to redefine its complaint in terms of "trade dress" issues by accurately observing that:

> Even if we were to agree that plaintiffs' objective was to address the "striking similarity of the telephones [which] lulls the plaintiffs and consuming public into believing that they are using Bell telephones providing Bell rates and services," the claims would be preempted. Eliminating the public's confusion is the "object sought to be obtained" by Congress by enacting Bell rates and services," the claims would be prewould stand as an obstacle to the accomplishment of Congress's goals and objectives because differing local rules regarding operator services would ultimately add to consumer confusion, not diminish it.

(Pet. App. 13; citations omitted.)

The Illinois Supreme Court declined to review the circuit court's decision. (Pet. App. 1.)

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied because petitioners have not identified a conflict with any decision of any court, and have not raised any important legal issue that deserves this Court's attention. Petitioners seek correction of what they mischaracterize as an overly expansive

preemption ruling by an intermediate state court of limited geographic jurisdiction—a ruling that the Illinois Supreme Court (which has every incentive to be vigilant against overly expansive preemption rulings) deemed insufficiently important to warrant review. Thus, even if petitioners had colorable arguments on the merits, there would be no reason for this Court to consider them.

In any event, both the result below and the reasons provided by the Illinois appellate court for its decision are plainly correct. The relief petitioners sought from the state court—an injunction requiring uniform future rates for interstate OSP service, and a refund of a portion of prior rates—obviously transgresses the federal government's exclusive authority over the terms and conditions of interstate telecommunications services, and conflicts with Congress' decision in TOCSIA that OSP rates should be governed by market forces. Similarly, the substantive duties petitioners seek to impose on OSP providers conflict with the objectives of TOCSIA because (as the Illinois appellate court correctly held) they risk causing the very confusion Congress sought to eliminate, and upset the careful balance between regulation and competition that Congress deliberately struck.

1. The sole question framed in the petition—whether the court below incorrectly held that Congress had occupied the field of regulating operator services providers—is not genuinely at issue in this case. The relief petitioners sought is obviously preempted both by Sections 151 and 152 of the 1934 Communications Act and by TOCSIA because the requested relief would effectively dictate rates for interstate OSP telephone service—a subject governed exclusively by federal law. Furthermore, the Illinois appellate court correctly held that petitioners' claims were preempted because they *conflicted* with Congress' objectives under TOCSIA. Pet. App. 13 ("[a]llowing State action in this arena would stand as an obstacle to the accomplishment of Congress's goals and objectives because differing

local rules regarding operator services would ultimately add to consumer confusion."). It is elementary that state law is preempted if it conflicts with federal law—irrespective of whether Congress has occupied the field. *E.g., Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Remarkably, petitioners never discuss these aspects of the Illinois court's decision. Thus, even if petitioners were to prevail on the sole question presented in the petition, it would not entitle them to reversal of the decision below because their claims are preempted irrespective of whether TOCSIA occupies the field of OSP regulation. It is axiomatic that this Court reviews judgments, not statements in opinions.

2. Review is also unwarranted because the decision below does not conflict with any decision of a United States court of appeals or a state court of last resort. Indeed, the decision at issue appears to be the first judicial interpretation of the preemptive scope of TOCSIA. The only published opinion on this question was rendered by the Federal Communications Commission, and it is entirely consistent with the decision below. In *In re OSPA*, 6 F.C.C.R. 4475 (1991), the FCC reviewed a Tennessee statute providing that Operator Service Providers (OSP's) who failed to comply with certain rate and disclosure requirements violated the Tennessee Consumer Protection Act. The Tennessee statute addressed issues identical to those raised by petitioner's complaint. For example, the statute required that before providing service, any OSP charging a rate that exceeded the highest rate charged by a dominant carrier, such as AT&T, must: 1) identify by name the carrier providing the service; 2) state the costs associated with the requested service; and 3) offer to transfer the customer to any other carrier offering operator-assisted services and inform the customer that the transfer would be made without charge. *In re OSPA*, 6 F.C.C.R. at 4475.

The FCC declared that the statute was preempted:

> TOCSIA and its legislative history make clear that Congress viewed TOCSIA as establishing a "regulatory framework" for the interstate operator services industry, and as filling a need for comprehensive solutions . . . . [T]o implement this framework, the statute establishes a broad range of requirements governing the industry . . . Thus, it is apparent that Congress intended to, and did, create a comprehensive legislative solution to any problems in the interstate OSP industry—a federal solution that precludes a potpourri of differing state requirements applicable to interstate services.

In re OSPA, 6 F.C.C.R. at 4477. Moreover, the FCC explained that notification requirements which exceed those mandated in TOCSIA, like those petitioners seek here, "make impossible achieving the balance established by Congress between the degree of regulation and reliance on market place forces for interstate OSPs." *Id.* at 4478. The balance between unfettered competition and the public's right to be informed was Congress' way of protecting "consumers from the problems caused by the entrance of these new carriers while avoiding overly stringent regulation that could harm the development of a competitive operator services market." Thus, the only two opinions which appear to have addressed the issue—*In re OSPA* and the case under review here—reached the same conclusion.

3. Review is also unwarranted because the opinion below does not conflict with a prior decision of this Court. Under this Court's well-established preemption analysis, congressional intent is the "ultimate touchstone" for determining whether a federal statute preempts state law claims. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. at 2617. As recently as last term, this Court reaffirmed the principle that congressional intent governs preemption analysis. *Medtronic, Inc. v. Lohr*, Nos. 95-754, 95-886, 1996 U.S. LEXIS 4260, *27 (June 26, 1996). In *Medtronic*, this Court explained that congressional intent

can be discerned primarily from statutory language and its accompanying "statutory framework." *Id.* (quoting *Gade v. National Solid Waste Management Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)). Thus, in assessing the preemptive scope of TOCSIA, the court below properly reviewed TOCSIA's language and legislative history. After careful and detailed consideration, the court concluded that "[t]he purpose of TOCSIA was to end deceptive practices by telephone service providers and to grant consumers the opportunity to make informed choices regarding telephone services," that Congress sought to establish a comprehensive and exclusive regulatory framework, and that enforcement of state law in the manner sought by petitioners would conflict with Congress' objectives. (Pet. App. 9.)

The court, in other words, applied this Court's established analysis to TOCSIA. While Petitioners may contend that the outcome of the court's analysis is wrong—that is, that their state claims are not preempted by TOCSIA—they cannot question the validity of the method of analysis itself. Thus, Petitioners resort to asking this Court to sit as a court of error to correct what they perceive to be the Appellate Court of Illinois' misapplication of settled preemption analysis.

4. In any event, the Illinois appellate court's ruling was plainly correct in all respects. Petitioners' claim is that the defendant OSPs passed off their rates and services from public telephones as AT&T's rates and services. Thus, petitioners assert that because of these alleged deceptive practices, petitioners believed "that they were using an AT&T or Bell serviced telephone, when in actuality they were using an alternate operator service." (Pet. 4.) To remedy these "deceptions," petitioners asked the circuit court to (1) order all OSPs to undertake additional "warnings" with respect to interstate calls, beyond those required by TOCSIA, to identify themselves to con-

sumers and (2) to prohibit every OSP in the nation from charging non-AT&T rates for interstate calls. Petitioners' claims and the relief they seek directly conflict with the requirements Congress has set for the OSP industry.

Both the substantive duties petitioners seek to impose and the remedies they request are flatly inconsistent with federal law. At bottom, petitioners seek to reorder the balance Congress struck between need for competition in the OSP industry and the need to provide information to consumers. As petitioners would have it, Congress should have required more or different "warnings" to consumers so that consumers would not be misled into believing "they were using AT&T or Bell serviced telephone[s], when in actuality they were using an alternative operator service." (Pet. 4.) As the appellate court correctly held, however, "[a]llowing State action in this arena would stand as an obstacle to the accomplishment of Congress' goals and objectives because differing local rules regarding operator services would ultimately add to consumer confusion, not diminish it." (Pet. App. 13); *accord In re OSPA*, 6 F.C.C.R. at 4478 ("[d]iffering federal and state requirements applicable to interstate operator services as consumers travel around the country making long distance calls are more likely to confuse, than to educate consumers").

In addition, petitioners' claims conflict with the goals of TOCSIA and the Federal Communications Act relating to interstate rates. Petitioners' complaint seeks an injunction requiring every OSP in the nation to charge the same rates and prohibiting them from billing and collecting rates set forth in their tariffs filed with the FCC pursuant to federal law. (Pet. App. 11.) In enacting TOCSIA, Congress expressly rejected the rate regulation the petitioners seek. *In re OSPA*, 6 F.C.C.R. at 4478. In any event, the rates charged by telecommunications carriers are at the very heart of the Communications Act's regulatory scheme.

Petitioners cannot avoid this result by recasting their claim as a challenge only to the alleged passing off of the telephone *instruments* as AT&T's, rather than a claim that OSPs "pass off" their rates and services as those of AT&T. The appellate court correctly rejected this gambit, stating that "[n]owhere in the prayer for relief do [petitioners] even mention the physical appearance or location of the public phones." (Pet. App. 12) Even in their petition before this Court, petitioners admit that they bring "claims relating to interstate telephone calls made from the concerned telephones . . . ." Moreover, even if petitioners' complaint *did* claim that consumer confusion over the identity of OSPs should be dealt with by changing the appearance of pay phones, it would be preempted. Congress already has decided how best to reduce consumer confusion while fostering competition.

Nor does the so-called "savings clause" contained in Section 414 of the 1934 Communications Act save petitioners' claims. That clause makes clear that the 1934 Act does not "abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414. As courts consistently have held, this provision preserves state law claims if, and only if, the state law claim challenges conduct not regulated by the Act. *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701 (1st Cir. 1977); *Kellerman v. MCI Telecommunications Corp.*, 493 N.E.2d 1045 (Ill.), *cert. denied*, 479 U.S. 949 (1986). Where, as here, the state law claim concerns matters covered by the Act, Section 414 does not apply and the state law claim is preempted. *Thermalcraft, Inc. v. U.S. Sprint Communications Co.*, 779 F. Supp. 1039, 1041 (W.D. Mo. 1991); *M.R.C.S., Inc. v. MCI Telecommunications Corp.*, No. Civ. A 86-3831, 1987 U.S. Dist. LEXIS 5244, *6 (E.D. La. Jun. 16, 1987).

Petitioners' reliance on *Kellerman* is misplaced. The complaint in *Kellerman* alleged that the defendant had disseminated specific advertisements and promotions (iden-

tified and attached to the *Kellerman* complaint) that contained allegedly false statements about its rates and practices. *Kellerman*, 493 N.E.2d at 1048. The complaint in *Kellerman*, therefore, challenged conduct *independent of the defendant's provision of telecommunications services* —conduct which was not regulated by federal law. Because the advertising at issue was sufficiently removed from the objectives of Congress in enacting the Communications Act, the Illinois Supreme Court concluded that the state law claims presented there were not preempted. However, the Illinois Supreme Court reaffirmed the preemption principle which the appellate court applied here:

> [I]t is implausible to think that section 414 of the Act preserved all State-law remedies affecting interstate telephone carriers no matter how repugnant those State laws are to the purposes and objectives of Congress . . . . It is reasonable to presume that State laws which interfere with Congress' objective . . . to regulate interstate carriers' charges or services, would be preempted by the Act.

Id. at 1051; *accord Thermalcraft*, 779 F. Supp. at 1041 (quoting *Kellerman*, 479 N.E.2d 1057, 1061 (Ill. App. 1985). Moreover, *Kellerman* did not involve operator services and was decided years before Congress enacted the detailed legislative scheme in TOCSIA. Thus, this Court had no occasion in *Kellerman* to consider the preemptive effect of TOCSIA's notification requirements or its other provisions.

Equally misplaced is petitioners' offhand reliance on this Court's recent holding in *Medtronic, Inc. v. Lohr*, Nos. 95-754, 95-886. Petitioners cite this case for the proposition that preemption of state law claims may not be maintained in the face of an express savings clause. In *Medtronic*, this Court overturned the lower court's preemption of state law causes of action because there was no rational nexus between the federal statute at issue and the state law causes of action asserted by the plaintiff.

Because the federal statute was unrelated to the conduct targeted by the state law claims, preemption of those claims was not appropriate. In reaching this decision, however, the Court expressly acknowledged that preemption is warranted when, as here, a state law cause of action encroaches upon a clearly articulated federal legislative objective. The Court observed that the case presented in *Medtronic* is:

> unlike a case in which the Federal Government has weighed the competing interests relevant to the particular requirement in question, reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case or set of cases, and implemented that conclusion via a specific mandate . . .

1996 U.S. LEXIS 4260, at *53. In this case, Congress has plainly weighed the competing interests, and set forth clear rules for the operator services industry.

The appellate court in the instant case correctly found that petitioners' claims are preempted because petitioners request relief which, if granted, would directly contradict the carefully wrought regulatory objectives of Congress. By seeking an "injunction prohibiting the charging of non-BOC rates . . . and an injunction enjoining the Defendants from billing and collecting non-BOC rates," petitioners challenge the right of respondents to charge and collect their federally-filed rates for the service they provide to the public. In so doing, they "undermine the determination of TOCSIA that the interstate OSP marketplace, at least for the time being, be permitted to operate free of rate regulation." *In re OSPA*, 6 F.C.C.R. at 4478.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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